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COURT OF APPEALS NO. 57935-5-I
Superior Court No. 05-1-08111-9 SEA

IN THE COURT OF APPEALS FOR THE STATE OF WASHINGTON

DIVISION I

MARK LUDVIGSEN, Appellant/Petitioner,

v.

STATE OF WASHINGTON DEPARTMENT OF LICENSING,

Respondent.

REPLY BRIEF OF PETITIONER

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A. REPLY

a. Standard of Review – The City argues that because "[s]tatutes are presumed constitutional and the party challenging them has the burden of proving unconstitutionality beyond-a-reasonable doubt",[1] "Ludvigsen has the burden herein to prove beyond-a-reasonable doubt his claim of unconstitutionality."[2] The City seems confused on a couple of points.

First, Mr. Ludvigsen has not claimed that any statute is unconstitutional. He has only claimed that if the provisions in question were retroactively applied to his case, then the act of retroactively applying them would violate the *ex post facto* and due process clauses of the State and Federal Constitutions. Accordingly, he carries no burden to prove that any statute is unconstitutional beyond a reasonable doubt.

"An appellate court reviews issues regarding statutory construction de novo." *City of Walla Walla v. Topel*, 104 Wn.App. 816, 819 (2001). "Interpretation of the constitution is also a question of law reviewed de novo." *State v. Pulfrey*, 154 Wn.2d 517, 522 (2005). Under these principles, the Court considers whether a law applies retroactively and whether doing so violates *ex post facto* requirements *de novo*. *Topel*, *supra*; see also, *State v. Hanson*, 151 Wn.2d 783, 784 (2004).

The general rule is that statutory and regulatory amendments are

[1] Respondent's Brief of the City of Seattle (Resp. Br.) 19-20.

presumed to operate prospectively only.[3] Where they do not expressly provide for retroactive application, it should not be judicially implied.[4] In particular, laws governing the administration of alcohol tests are presumed to apply only to tests made after their effective date.[5] Any law that alters legal rules of evidence, receiving less, or different, testimony, than the law required at the time of the offence in order to convict an offender, violates the prohibition against *ex post facto* laws.[6] A provision applied retroactively in a criminal proceeding will violate due process if doing so would be fundamentally unfair.[7]

Second, Mr. Ludvigsen has not claimed that any of the aforementioned constitutional provisions have yet been violated. To the contrary, Mr. Ludvigsen's argument carried the day in the Trial Court leading to the suppression of the evidence at issue here. Mr. Ludvigsen's argument on appeal is that the Trial Court correctly decided the matter below and its determination of the matter should be reinstated.

In this context, "[a] decision on the admissibility of evidence is within the discretion of the trial court." *In re Detention of Halgren*, 124 Wn.App. 206, 220 (2004). Where a trial court has made a determination

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[2] Resp. Br. 24.
[3] Appellant's Opening Brief of Mr. Ludvigsen (App. Br.) 31.
[4] APP. Br. 31.
[5] App. Br. 31.
[6] App. Br. 14.

suppressing evidence, on review "the rule [is] that the action of the court will generally be sustained where any good reason therefore exists, [even if] the one relied upon by the court may have been insufficient." *Lyts v. Keevey*, 5 Wn. 606, 609-10 (1893); *Rawlins v. Nelson*, 38 Wn.2d 570, 578 (1951); *In re Improvement of Rockwood Blvd.*, 170 Wn. 64, 68 (1932). Accordingly, the City carries the burden to establish that "no good reason exists" to support the Trial Court's suppression of the evidence herein.

b. Distinction Between former SMC 11.56.020 and RCW 46.61.506 – "[A] city is free to enact and enforce ordinances relating to the regulation of the operation of vehicles on public highways, ['including...provisions prohibiting driving while under the influence of intoxicating liquor'] as long as the ordinance does not interfere with the statutory uniformity requirement." *City of Seattle v. Williams*, 128 Wn.2d 341, 353-4 (1995); *City of Bellingham v. Schampera*, 57 Wn.2d 106, 110-2 (1960).

> In determining whether an ordinance is in "conflict" with general laws, the test is whether the ordinance permits or licenses that which the statute forbids and prohibits, and vice versa. Judged by such a test, an ordinance is in conflict if it forbids that which the statute permits...Unless legislative provisions are contradictory in the sense that they cannot coexist, they are not to be deemed inconsistent because of mere lack of uniformity in detail.

Schampera at 111 (*citations omitted*).

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[7] App. Br. 33-4.

One noticeable difference between SMC 11.56.020, as it existed in 2002, and RCW 46.61.502 was that the City Code referenced an analysis "made under [its own] provisions" while the State statute referenced an analysis "made under RCW 46.61.506."[8] As the City points out, the relevant provisions, SMC 11.56.020(J) and RCW 46.61.506(3), were nearly identical and so satisfied the statutory uniformity requirement.[9]

The absence of language generally adopting RCW 46.61.506 or evidencing any intent to be bound by its subsequent amendments is significant, however. It manifests the intent that former SMC 11.56.020 be given independent effect immune from any subsequent amendments to RCW 46.61.506.[10] In other words, although uniform with State law, the Ordinance was meant to stand on its own with respect to the provisions in question and supply an independent basis for the prosecution of DUIs.[11]

As a result, subsequent amendments to RCW 46.61.506 might invalidate the Ordinance if no longer uniform therewith, but the Ordinance did not intend for them to be automatically incorporated into it.[12] The City retained for itself the power to choose whether or not to continue to supply an independent basis for prosecution of the crime of DUI in such

[8] App. Br. 18.
[9] Resp. Br. 4; App. Br. 18-9.
[10] App. Br. 18, 23.
[11] App. Br. 18-20.
[12] App. Br. 18, 23.

circumstances through adoption of new provisions in accord with any newly enacted State law. The importance of this is that the 2004 amendments to RCW 46.61.506(4) cannot be read into former SMC 11.56.020, *the Ordinance under which Mr. Ludvigsen was charged*.[13]

1. RETROACTIVE APPLICATION OF SMC 11.56.020, WAC 448-16 AND RCW 46.61.506 AS AMENDED IN 2004 TO A 2002 CHARGE OF DUI UNDER FORMER SMC 11.56.020 AND WAC 448-13 IS A VIOLATION OF THE EX POST FACTO CLAUSES OF THE WASHINGTON STATE AND FEDERAL CONSTITUTIONS.

a. Issue Properly Before the Court – The City implies that this issue is not properly before the Court because "[d]espite the opportunity to raise the issue on RALJ review below, Ludvigsen failed to do so."[14] Mr. Ludvigsen clearly raised the *Ex Poste Facto* argument as a primary basis for his Motion for Discretionary Review.[15] In response, not only did the City fail to object to this issue being raised, but it affirmatively stated that: "The City agrees discretionary review of this petition is appropriate in this case and should be granted."[16] The Court will not revisit a decision to grant review of an issue under such circumstances. *City of Spokane v. Whitehead*, 128 Wn.App. 145, 149 (2005).

Even if the Court were inclined to revisit its decision to grant

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[13] App. Br. 18, 23. Because these new amendments resulted in former SMC 11.56.020 no longer satisfying the uniformity requirements, the City did enact a new Ordinance.
[14] Resp. Br. 14.
[15] Motion for Discretionary Review, p.i, 1-2, 4.

review on this issue, it must be remembered that Mr. Ludvigsen prevailed on the motion to suppress at the trial level arguing that the new statutes and regulations could not be retroactively applied.[17] While the record is not explicit that the Court's ruling was made on *ex post facto* grounds, Mr. Ludvigsen may raise the argument here "under the rule that the action of the [trial] court will generally be sustained where any good reason therefore exists, although it may not have been the one which moved the court to act." *Keevey* at 609-10; *Rawlins* at 578; *Rockwood Blvd.* at 68.

Even if these principles were to be ignored, however, the general rule against considering issues raised for the first time on appeal is not absolute "and does not automatically preclude the introduction of an issue at the appellate level." *Pulcino v. Federal Express Corp.*, 141 Wn.2d 629, 649 (2000); *State v. Ford*, 137 Wn.2d 472, 477 (1999). "A reviewing court may consider questions raised for the first time on appeal if necessary to serve the ends of substantial justice or prevent the denial of fundamental rights. This rule is peculiarly applicable in criminal cases." *Maynard Inv. Co. v. McCann*, 77 Wn.2d 616, 622 (1970). In such circumstances, the appellate court is not "confined by the issues framed or

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[16] City's Reply to Petition for Discretionary Review, p.2.

[17] App. Br. 2: "The trial Judge held that the newly enacted/amended provisions could not be retroactively applied to Mr. Ludvigsen's case because 'compliance with the Washington Administrative Code in the year 2002 is so substantive and not procedural under Clark-Munoz, and moreover, compliance with the Washington Administrative

theories advanced" below. *Id.* at 623.

In particular, "it is an established principle of law that constitutional claims may be heard for the first time on appeal." *State v. Hieb*, 107 Wn.2d 97, 108 (1986)(*citation omitted*). The appellate court "will review an error asserted for the first time on appeal if a cursory examination reveals a constitutional issue with practical and identifiable consequences [at] trial." *State v. Nemitz*, 105 Wn.App. 205, 214 (2001). Retroactive application of City and State statutes and regulations to a criminal prosecution necessarily raises *ex post facto* questions. *Carmell v. Texas*, 529 U.S. 513, 519, 120 S.Ct. 1620 (2000). Moreover, whether the prosecution against Mr. Ludvigsen may go forward is dependant upon whether his breath test results are admissible.[18] Accordingly, Mr. Ludvigsen's *ex post facto* argument is properly before the Court.

b. Sufficiency of the Evidence – The City argues that "[t]he 2004 Amendments do not alter in the least the evidence necessary to convict Ludvigsen of DUI."[19] The first thing that must be considered in evaluating this contention is what is meant by "sufficiency of the evidence" to support a conviction. "Sufficiency of the evidence rules...inform us whether the evidence introduced is sufficient to convict

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Code is so related to compliance with the statutory language in effect at that time, and thus substantive.'"

[18] App. Br. 2.

as a matter of law." *Carmell* at 546-7. This does not mean that based upon such evidence "the jury *must* convict, but only that, as a matter of law, the case may be submitted to the jury and the jury may convict." *Id.*

The next thing to remember is that under former SMC 11.56.020, a test that was not "valid" under the "provisions of the Washington Administrative Code in effect at the time the test [was] administered" was insufficient as a matter of law[20] to support a conviction under either the *per se* or "under the influence" prong.[21] *City of Seattle v. Clark-Munoz*, 152 Wn.2d 39, 44, 50 (2004). In particular, under the rules in force at the time of Mr. Ludvigsen's test, before a test was sufficient to support a conviction, the thermometer traceability requirements of WAC 448-13-035 must have been complied with.[22] *Id.*

Although a defendant could always challenge the accuracy and reliability of a test at trial, once the requirements for admissibility have been satisfied the test, and the case itself, can be submitted to the jury for a determination of guilt. *State v. Straka*, 116 Wn.2d 859, 870, 875 (1991). Accordingly, the new Ordinance, through its incorporation of the newly

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[19] Resp. Br. 16.
[20] The City argues that "labeling breath test evidence as 'insufficient as a matter of law' under the former procedures is not illuminating." Resp. Br. 19. This conflicts with the explicit reasoning of *Carmell* where the Court found an *ex post facto* violation because under the law in effect at the time the acts were committed, the prosecution's evidence "was legally insufficient." App. Br. 14-5.
[21] App. Br. 19-30.
[22] App. Br. 20-3, 27-28.

amended Statute, not only provides for the admissibility of tests which do not constitute a "valid" test but they allow the jury to consider such tests, even if "validity" has been disproved.[23] RCW 46.61.506(4)(c). Further, the new Ordinance, Statute and Regulations, not only also provide for the admissibility of tests which are not traceable to NIST but they allow the jury to consider such tests, even if NIST traceability has been disproved.[24]

From this it is clear that both an invalid test and a test not complying with NIST traceability requirements were insufficient as matter of law to support a conviction under the old law.[25] Under the new law, the City no longer has to provide evidence at any stage of the prosecution that a test was "valid" or in particular that that the former NIST traceability requirements have been complied with. The City actually admits the later point in its own brief.[26] Thus, evidence that was insufficient as a matter of law under the old regime has been rendered sufficient as a matter of law under the new as it may now be considered and relied upon by the jury without more (as it relates to the element of a crime), in making a determination of guilt.[27] This is exactly what occurred in *Carmell*.[28]

As a result, application of the newly enacted Ordinance, Statute

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[23] App Br. 24-8.
[24] App. Br. 23-4.
[25] See App. Br. 12 for U.S. Supreme Court's characterization of similar provisions.
[26] Resp. Br. 6.
[27] App. Br. 22-30.

and Regulations: (1) alters the *legal* rules of *evidence*, and receive less, or different, testimony, than the law required at the time of the commission of the offence, *in order to convict the offender*; and (2) makes it easier for the prosecution to meet the threshold for overcoming the presumption of innocence by allowing it to rely on evidence formerly deemed insufficient as a matter of law to support a conviction.[29] Reason alone, not to mention the principles set forth in *Calder* and reiterated in *Carmell*, dictates that the new Ordinance, Statute and Regulations do NECESSARILY alter the evidence necessary to convict Mr. Ludvigsen of DUI.

Nonetheless, the City cites to *State v. Long*, 113 Wn.2d 266 (1989), where the Court retroactively applied a statute permitting the admission of an individual's refusal to submit to a breath test as evidence in the prosecution's case in chief whereas prior to the amendment the statute permitted such evidence by the prosecution only in rebuttal. The City claims that that "court faced an almost identical circumstance to our own herein."[30] The most glaring distinction is that prior to their amendment, the Ordinance, Statute and Regulations considered herein prohibited the admissibility of Mr. Ludvigsen's test result under any circumstances. *Clark-Munoz* at 44, 50. Thus, while *Long* involved a

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[28] App. Br. 12-5.
[29] App. Br. 25, 27-8.
[30] Resp. Br. 8, 10-1.

statute which merely changed the circumstances under which already admissible evidence could be used, this case involves changes in law making previously inadmissible evidence fully admissible.

Moreover, the conclusion that the issue herein is "almost identical" to the one considered in *Long* is based on a misunderstanding of the difference between two types of evidentiary rules. On one hand, there are rules that simply identify classes of evidence from which other facts capable of establishing of guilt can be found. On the other hand, there are rules that identify specific pieces of evidence that are either necessary or minimally sufficient to establish the necessary elements of a crime.[31] The former affects only "the mode in which the facts constituting guilt may be placed before the jury." *Hopt v. People of Territory of Utah*, 110 U.S. 574, 590, 4 S.Ct. 202, (1884). The latter, "governs the sufficiency of those facts for meeting the burden of proof." *Carmell* at 545.

The rule governing refusal evidence considered in *Long* allows evidence before a jury from which other facts permitting a general inference of "guilt or innocence" can be found. *Long* at 272. An inference supporting guilt may be made where the jury finds that a particular individual's decision not to submit to a breath test reveals a consciousness of guilt. *State v. Cohen*, 125 Wn.App. 220, 225 (2005).

[31] App. Br. 8-16.

The rule runs both ways, however, because under it "refusal evidence is [also] relevant and fully admissible to infer...innocence." *Long* at 272. This results, in part, from the fact that "[a] defendant may have valid reasons for refusing a test, reasons which do not reflect consciousness of guilt." *City of Seattle v. Boulanger*, 37 Wn.App. 357, 359 (1984).

The statute considered in *Long* never made introduction of refusal evidence necessary to the attainment of a DUI conviction. *Boulanger* at 359. Nor did it ever make such evidence sufficient to support a conviction. *State v. Wilhelm*, 78 Wn.App. 188, 192-3 (1995). Alone, a "refusal [is] insufficient to overcome the presumption of innocence" in a charge for DUI.[32] *State v. Stevens*, 580 A.2d 493, 496 (Vt. 1990).

The reason for this is twofold. First, a conviction on the per se prong requires breath or blood test results. Former SMC 11.56.020(A)(1)(a); RCW 46.61.502(1)(a); *Clark-Munoz* at 44. If a person has refused to submit to a test so that there are no such test results, he cannot be found guilty on the *per se* prong of the offense. Second, there is no direct or necessary link between intoxication and an individual's choice to refuse to submit to a test of his state of intoxication. *Saucier v. State*, 869 P.2d 483, 485-6 (Alaska App. 1994); *State v. Cozart*,

[32] Unlike in some other states, it is not a crime to refuse to submit to a breath test in Washington. To the contrary, every motorist in the state has the affirmative right to refuse to submit to a breath test. RCW 46.20.308(2).

352 S.E.2d 152, 157 (W.Va. 1986). "A defendant may have valid reasons for refusing a test." *Boulanger* at 359. Accordingly, to "support[] a reasonable inference of intoxication" for purposes of the under the influence prong, a refusal to submit to a breath test must at least be accompanied by "[s]trong circumstantial evidence" of intoxication. *Wilhelm* at 192-3; *Cf.*, *Clark-Munoz* at 44 (evidence must tend to "show that the defendant was under the influence of alcohol").

By simply enlarging the class of evidence from which other facts (consciousness of guilt) capable of establishing an inference of guilt could be found, the amended statute considered in *Long* did not subvert the presumption of innocence. It couldn't because it did not concern evidence deemed prior or subsequent to that amendment to be sufficient to overcome the presumption. The amended evidentiary rule had no effect on the quantum of evidence necessary to sustain a conviction for DUI. It affected only the mode by which evidence supporting, but not sufficient on its own to sustain, an inference of guilt could be placed before the jury.

On the other hand, the Ordinance under consideration here specifically and explicitly made it a crime to drive with a BAC of ".08 or higher, as shown by analysis of the person's breath or blood made under the provisions of this section."[33] Thus, with respect to the *per se* prong,

[33] App. Br. 17.

not only is what constitutes minimally sufficient evidence to convict set out in, but the evidence required to convict is mandated by, the Ordinance: an "analysis of the person's breath or blood made under the provisions of this section."[34] On the per se prong, it clearly "inform[s] us whether the evidence introduced is sufficient to convict as a matter of law."

As the Ordinance and Regulations stood at the time of Mr. Ludvigsen's breath test, conviction on the *per se* prong required a "valid" test where the "criteria applied to determine the validity of any test and so certify it, [were] those provisions of the Washington Administrative Code in effect at the time the test [was] administered" and included the NIST traceability requirement.[35] Absent such evidence, a conviction on the per se prong could not be sustained. So strict were these rules that even in the context of State statutes they precluded administrative sanctions unless compliance with their requirements had been demonstrated. *Dept. of Licensing v. Cannon*, 147 Wn.2d 41 (2002). Thus, the provisions in question, at least with respect to the *per se* offense, are clearly distinguishable, and different in nature, from those encountered in *Long*. They constitute the same sort of sufficiency of the evidence rules encountered in *Carmell*.[36]

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[34] App. Br. 19-20.
[35] App. Br. 20-2.
[36] App. Br. 22-3.

As for the under the influence prong, under the law in place at the time Mr. Ludvigsen's test was administered, an "invalid" breath test, including one not satisfying NIST traceability requirements, was not considered "competent" evidence of intoxication. *Clark-Munoz* at 48-9. Thus, while *Long* involved a statute which merely changed the circumstances under which already admissible evidence could be used, this case involves changes in law making evidence previously incompetent to demonstrate intoxication under any circumstance fully admissible.[37] Moreover, the changes in the Ordinance, Statute and Regulations run completely in the prosecutions favor making it easier to obtain convictions.[38] Thus, the provisions in question are clearly distinguishable, and different in nature, from those encountered in *Long* even with respect to the under the influence prong. They clearly constitute sufficiency of the evidence rules as contemplated by *Calder* and *Carmell*.[39]

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[37] App. Br. 28-9.

[38] App. Br. 29-30. In a prosecution for DUI, forensic breath "test results are 'virtually dispositive of guilt or innocence.'" *Mack v. Cruikshank*, 2 P.3d 100, 104 (Ariz.App. 1999). This is so even where the state is not prosecuting under the *per se* prong of a DUI statute because most jurors "would conclude that a person with [a] reading [in excess of the *per se* limit] was intoxicated when it was taken, in the absence of substantial evidence to the contrary." *State v. McElroy*, 568 So.2d 1016, 1016-7 (La. 1990)(Dennis, J., concurring). Absent countervailing evidence, "[a] citizen's right to drive, and sometimes to liberty, will depend on the verdict of a machine." *State v. Garthe*, 678 A.2d 153, 158 (N.J. 1996).

[39] App. Br. 7, 15-6, 28-30. The circumstances in this case seem to conclusively establish that the provisions in question constitute sufficiency of the evidence rules. After suppressing the breath test the Court found that the City could "not go forward with the case." CP 10. This is a clear indication that, standing alone, the evidence in question was sufficient to support a conviction. Moreover, it demonstrates that the evidence was

c. Retroactive Effect – The City claims that the provisions in question do not act retroactively because they "relate to admissibility of breath tests and the standards judicial officers apply during breath test admissibility hearings."[40] The suggestion is that since the triggering event for the Court's actual consideration and application of the rule is a hearing on the admissibility of such evidence, the rule does not come into play until that time and so by its very nature acts prospectively. Although alluring, the argument is overly simplistic. If the question presented could be so easily dismissed, no rule of evidence would ever run afoul of *ex post facto* constraints. As the Nation's highest Court has made clear, though, this is not the case.[41]

In *Carmell*, the Court considered an evidentiary rule which conditioned the admissibility of evidence on the age of a victim "at the time of the alleged offense."[42] Under the City's analysis, the rule would have been exempt from *ex post facto* constraints because the triggering event for the Court's actual consideration and application of the rule would have been the hearing on the admissibility of the evidence.

The rule in effect at the time of the alleged offense, however,

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considered to be that necessary to be minimally sufficient to convict. Thus, at least with respect to this case, the provisions in question constitute sufficiency of the evidence rules.

[40] Resp. Br. 5.

[41] App. Br. 6-7, 10-12.

[42] App. Br. 12.

explicitly tied its application to "the time of the alleged offense." In so doing, the rule designated a triggering event prior to its application in court: "the time of the alleged offense." The Court found that applying the subsequently enacted rule to an offense that occurred while the former rule was in effect was an *ex post facto* violation. Clearly, then, the triggering point for the application of the rule was "the time of the alleged offense" and not a later hearing on the admissibility of the evidence.

Similarly, the rule in place at the time of Mr. Ludvigsen's offense explicitly stated that the "criteria applied to determine the validity of any test and so certify it, should be those provisions of the Washington Administrative Code in effect at the time the test is administered." *Former* WAC 448-13-060(5) (repealed 10/23/04). This is nearly identical to the rule encountered in *Carmell*, tying its application to "the time the test is administered." Clearly, then, the triggering point for the application of the rule was "the time the test [was] administered" and not a later hearing on the admissibility of the test results.

This interpretation is supported by the State Supreme Court's determination in *Poston v. Clinton*, 66 Wn.2d 911 (1965), nearly half a century ago. *Poston* dealt with a statute which read:

> Evidence of...scientific breath test of any kind...shall not be admissible unless such person shall have been advised by the person giving the test before giving the test that such

> person has the constitutional right not to submit to such test. Evidence taken in violation of this act shall not be admitted in evidence in any criminal or civil proceeding.

Poston at 915 (*emphasis added*).

The Court concluded that:

> ...the legislative intent is clear that the [] act operates prospectively because of the requirement that the person giving the test advise the person being tested of his "right not to submit to such a test." The legislature, evidently, adopted a standard by which officers should be governed in taking alcoholic blood tests in the future. Although the act effects only a remedy, the requirement of a particular warning indicates a legislative intent that it apply to tests made after the effective date of the act.

Poston at 916 (*emphasis added*).

Nonetheless, the City cites to a number of cases in support of its contention that the rules governing the admissibility of breath test results, by their very nature, act strictly prospectively. The first is *Letourneau v. Dept. of Licensing*, 131 Wn.App. 657 (2006). Although *Letourneau* may be instructive for some purposes, because it was a civil administrative proceeding, it neither addressed, nor was bound by, *ex post facto* considerations. Accordingly, the fact that the Court therein may have applied some of the new provisions at issue here to a test conducted prior to their enactment has no bearing on the outcome of an analysis conducted under *ex post facto* principles. Identical considerations render *Superior Asphalt & Concrete Co. v. Department of Labor and Industries*, 19

Wn.App. 800 (1978), another civil matter, inapposite as well.

The City gets closer to the mark citing *City of Seattle v. Carnell*, 79 Wn.App. 400 (1995), for the proposition that, in rejecting a foundational challenge, "the court applied the foundational requirements adopted after the February 13, 1991 date-of-violation."[43] While true, what the City fails to mention at this point is that in the very next sentence the Court was careful to include the foundational requirements in effect at the time of the violation as well. *Carnell* at 405. The Court's ambivalence as to which law to rest its decision on is understandable, though, given that it was likely aware that an *ex post facto* issue might exist but did not address it since it had not been raised by either party.

Standing in direct opposition to the City's claim on this issue, however, is *State v. MacKenzie*, 114 Wn.App. 687 (2002), a case also relied upon by the City. The following facts were before that Court:

> On January 1, 1999, the legal breath alcohol concentration limit in Washington was lowered from .10 to .08. On April 1, 1999, the state toxicologist amended numerous provisions of the [WAC] to comply with the new statute. When the state toxicologist amended the administrative regulations, he failed to amend WAC 448-13-060, which addressed the accuracy of test results obtained from a [DataMaster]. Thus, although all of the machines were changed to conform to the new legal limit of .08, the definition of a valid and accurate test remained one that registered a simulated external standard result between .090 and .110. On April 27, 1999, the state toxicologist filed

[43] Resp. Br. 8-9.

> emergency rule WAC 448-13-060(3) which stated: The simulator external standard result must lie between .090 to .110 inclusive for tests conducted prior to April 1, 1999, and .072 to .088 inclusive for tests conducted on or after April 1, 1999.

Mackenzie at 692.

The defendant was arrested on April 15, after the statutes and regulations had been amended to account for the new .08 standard but before the oversight in WAC 448-13-060 had been corrected. *Mackenzie* at 693, 695. At the defendant's subsequent trial, however, the state relied upon the corrected regulation. *Id.* at 695.

Under the City's argument, application of the corrected regulation to the defendant would have been considered prospective. This is not what the Court found, though. Instead, it concluded that by applying the corrected regulation to the defendant's case, the trial court had applied the rule retroactively. *Mackenzie* at 700. Application of a regulation governing the administration of breath tests to a test administered before the regulation was promulgated is retroactive.

d. Procedure and Substance – It is not how a law is labeled that determines whether it violates *ex post facto* constraints, but its actual effect.[44] Nonetheless, the City cites to the *City of Fircrest v. Jensen*, __ Wn.2d __, 143 P.3d 776 (2006) for the proposition that the Court's

[44] App. Br. 10-1.

characterization of the revisions to RCW 46.61.506 as "procedural" is consistent with the conclusion that retroactive application of the new provisions does not violate *ex post facto* guarantees.[45] What the City fails to mention is that the Court indicated that these purely "procedural" revisions "logically fit[] within the ambit of the regulation of vehicles and penalties for violations of those regulations." *Jensen* at 781. It is beyond dispute, however, that *ex post facto* constraints apply to "penalties for violations."[46] Accordingly, if we rely on *Jensen*, it would appear that the purely "procedural" matters of interest herein belong to a category of State action expressly subject to *ex post facto* constraints.

The City also cites to *MacKenzie*, *supra*, claiming that "the court concluded the breath test admissibility procedures in WAC 448-13 are not substantive."[47] Despite the City's contention, however, the court in *MacKenzie* did not conclude that "the breath test admissibility procedures in WAC 448-13 are not substantive."

In promulgating the emergency rule at issue in *MacKenzie*, discussed above, the State Toxicologist explicitly indicated that "[t]he purpose of this change is to correct an oversight in establishing the admissibility standards for breath alcohol test results." *Mackenzie* at 692.

[45] Resp. Br. 18.
[46] App. Br. 6-7, 9-10.
[47] Resp Br. 11.

The Court recognized that the Toxicologist had "inadvertently omitted changing one administrative regulation," and that the emergency rule was not meant to make a substantive change in the existing WAC but simply "correct this oversight." *Mackenzie* at 698. It then concluded that:

> When a statute or regulation is adopted to clarify an internal inconsistency to help it conform to its original intent, it may properly be retroactive...Here, the regulation attempted to correct an oversight in establishing the admissibility standards for breath alcohol test results...*Here*, the amendment...affected no substantive...rights.

Mackenzie at 699-700 (*Emphasis added*).

The conclusion the City holds out as general, then, is actually confined to the specific amendment before the court in *Mackenzie*. This is significant because the Court in *Mackenzie* was not addressing what was intended to be a substantive change in law. There was no question that the procedures intended under the .08 standard and implemented under the emergency rule were known to the parties because they mirrored the +/- 10% safeguard under the former .10 statute. Nor was there any dispute that the Toxicologist's actions were intended to do anything other than correct an obvious and inadvertent oversight that occurred in drafting the regulation. Mr. Ludvigsen agrees that the amendment involved in *MacKenzie* was not substantive and even that, although the Court never held as much, there was no *ex post facto* violation therein. The remedial

amendment did little more than correct a simple scrivener's error.[48]

The situation before this Court is very different than that encountered in *MacKenzie*. We are not dealing with the correction of inadvertent oversights to standards intended to be in place at the time of Mr. Ludvigsen's breath test. We are confronted with the wholesale replacement of the Ordinance, Statute and Regulations in effect at the time of Mr. Ludvigsen's test by new laws that had not even been contemplated at that time, and which completely change the rules governing the administration, admissibility and sufficiency of that test under the law. As previously argued the changes in law the City now seeks to apply to Mr. Ludvigsen's breath test are clearly substantive in nature.

2. RETROACTIVE APPLICATION OF SMC 11.56.020, WAC 448-16 AND RCW 46.61.506 AS AMENDED IN 2004 TO A 2002 CHARGE OF DUI UNDER FORMER SMC 11.56.020 AND WAC 448-13 IS A VIOLATION OF THE DUE PROCESS CLAUSES OF THE WASHINGTON STATE AND FEDERAL CONSTITUTIONS.

"The touchstone of due process is protection of the individual against arbitrary action of government." *Wolff v. McDonnell*, 418 U.S. 539, 558 (1974). In this context, "fair play...is the essence of due process." *Galvan v. Press*, 347 U.S. 522, 530 (1954). State actions that result "in a denial of fundamental procedural fairness" are prohibited.

[48] A "scrivener's error...is one resulting from a minor mistake or inadvertence, esp. in writing or copying something." *U.S. v. Gibson*, 356 F.3d 761, 766 n.3 (7th Cir. 2004).

County of Sacramento v. Lewis, 523 U.S. 833, 845-6 (1998).

> A law reducing the quantum of evidence required to convict an offender is [] **grossly unfair**. [In so doing] the government subverts the presumption of innocence...by making it easier to meet the threshold for overcoming the presumption. [In essence] the government refuses, after the fact, to play by its own rules, altering them in a way that is advantageous only to the State, to facilitate an easier conviction. There is plainly **a fundamental fairness interest**...in having the government abide by the rules of law it establishes to govern the circumstances under which it can deprive a person of his or her liberty.

Carmell at 532-3 (*emphasis added*).

As previously explained, retroactive application of the new provisions would have precisely the effect of reducing the quantum of evidence required to convict Mr. Ludvigsen. The City's attempt to apply them in this manner is a stark example of the government refusing, after the fact, to play by its own rules by altering them in a way that is advantageous only to the City in order to facilitate an easier conviction.[49] Such action is clearly fundamentally unfair and violative of Due Process.

The City begins its counter argument by claiming that Mr. Ludvigsen acknowledged that "his due process concerns in the application of retroactive legislation are the same as those encountered in his *ex post facto* analysis."[50] No such acknowledgement is contained anywhere in Mr. Ludvigsen's briefing. What Mr. Ludvigsen states is that "[m]any of

[49] App. Br. 35-7.

the due process concerns involved in the application of retroactive legislation are the same as those encountered in an *ex post facto* analysis so that the two protections rest on many of the same underlying principles."[51]

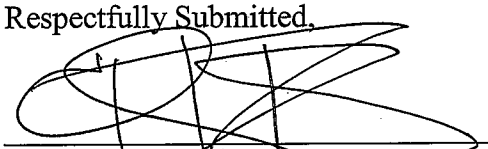
The City continues by attacking the case of *Kring v. State of Missouri*, 107 U.S. 221, 2 S.Ct. 443 (1883). Not only does Mr. Ludvigsen not cite to this case in his briefing, but *Kring* focuses solely on *ex post facto* considerations. Unlike *Carmell*, *Kring* doesn't discuss issues of fairness anywhere in its analysis. Thus, whether *Kring* is good law is inapposite to the due process issues presented. It is well recognized that due process places limitations on the retroactive application of statutes.[52]

B. CONCLUSION

For the aforementioned reasons, the Superior Court must be reversed and the Trial Court's determination reinstated.

DATED this 9 day of January 2007.

Respectfully Submitted,



Elizabeth Anne Padula, WSBA #24612
Ted Vosk, WSBA #30166

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[50] Resp. Br. 18.
[51] App. Br. 34.
[52] App. Br. 31-4, 37-8; see also, *Bouie v. City of Columbia*, 378 U.S. 347, 84 S.Ct. 1697, (1964) relied upon by, *Talavera v. Wainwright*, 468 F.2d 1013, 1015-6 (5th Cir. 1972).

IN THE COURT OF APPEALS FOR THE STATE OF WASHINGTON
DIVISION 1

MARK BENJAMIN LUDVIGSEN, Appellant, vs. STATE OF WASHINGTON, DEPARTMENT OF LICENSING, Respondent.	Court of Appeals No.: 57935-5-I King County Superior Court Case No.: 05-1-08111-9 SEA **CERTIFICATE OF SERVICE BY COURIER**

The undersigned certifies and declares as follows:

I am a citizen of the United States of America, over the age of eighteen years and competent to be a witness herein.

That on the 10th of January 2007, I sent by ABC Legal Messengers (with directions to deliver on or before January 10, 2007 at 4:30 p.m.), a true and correct copy of *REPLY BRIEF OF PETITIONER* directed to:

Moses Garcia
Seattle City Attorney's Office
700 5th Ave., 53rd Floor
Seattle, WA 98124-4667

I certify and declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED at Bellevue, Washington on January 10, 2007.

Cynthia Alvarez Engel
CYNTHIA ALVAREZ ENGEL, Legal Assistant

ORIGINAL

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